

# **APPELLATE ADVOCACY FOR PROSECUTORS**

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## **LOWER COURT APPEALS AND DISCRETIONARY REVIEW: STRATEGIES AND PRACTICAL TIPS**

Presented by:

**ALICE JONES**

Unit Chief Counsel, Office of the Attorney General

**ANDREA KEVER**

Deputy County Attorney, Maricopa County Attorney's Office

**GARY SHUPE**

Assistant Appeals Bureau Chief

Distributed by:

**ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL**

1951 West Camelback Road, Suite 202

Phoenix, Arizona 85015

**ELIZABETH ORTIZ**

**EXECUTIVE DIRECTOR**



## ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

Presents

# Appellate Advocacy for Prosecutors

## Framing the Issue

Gary L. Shupe  
Assistant Appeals Bureau Chief  
Phoenix City Prosecutor's Office  
gary.shupe@phoenix.gov

"In law . . . the right answer usually depends on putting the right question."  
*Rogers' Estate v. Helvering*, 320 U.S. 410, 413 (1943)

### I. How do you approach issue writing?

With dread? With resignation? With excitement? Do you view issue writing as merely a formal expectation or as critical to a successful appeal?

Framing the issue is probably the most important thing you'll do in your appellate brief.

#### References

Bryan A. Garner, *Going Deep the Key to Effective Pleadings Is A Clear and Succinct Statement of the Issues-and Here's How to Do It*, A.B.A.J., March 2017, at 26 (2017) ("A precise description of the questions presented in the case—or the statement of the issues—is the key element of an effective pleading.")

Ernst Jacobi, *Writing at Work: Dos, Don'ts, and How Tos* 40 ("The problem is the crux.")

## II. Are issues required in your brief?

Not always, but they should be. Superior Court Rule of Appellate Procedure–Criminal (SCRAP) 8(a)(3) doesn't require a questions-presented or statement-of-issues section. (SCRAP rules govern lower-court appeals.)

Thankfully, Arizona Rule of Criminal Procedure (ARCrP) 31.10(a)(3) does. (ARCrP 31 governs appeals from the superior court to the court of appeals.)

Don't just slap down an issue on your brief after you've finished writing it. Begin formulating the issues from the outset.

Always begin your brief with a statement of issues.

### References

Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 25

## III. Why draft issues for our briefs (besides the fact that most rules require it?)

Think about it from the courts' perspective.

- Judges decide issues. They're looking for a question to answer. Tell them what the issue is.
- All readers, including judges, are impatient. Tell them up front about the nature of your case. Pique their interest. Don't make them wade through your brief to guess at your issues.

Think about it from a litigant's perspective.

- Issues force you to understand precisely what your case is about.
- They guide the composition of your brief.
- They focus your attention on the relevant facts and law.
- And they dictate what relief you want.

### References

Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* 78–79

## IV. Don'ts

Don't start issues with whether. Issues begun this way don't form a complete sentence. Often these types of issues are nothing more than conclusory declarations that, oddly enough, end with a question mark. Sometimes these types of questions are unintelligible due to order or length.

Don't be afraid to use multiple sentences; eschew long, single sentences. Don't be afraid to include relevant facts in your issue.

### References

Bryan A. Garner, *Going Deep the Key to Effective Pleadings Is A Clear and Succinct Statement of the Issues-and Here's How to Do It*, A.B.A.J., March 2017, at 26 (2017)

Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 26

Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* 95

## V. Dos

Plainly, concretely, succinctly, and favorably state your issue. Be persuasive but not argumentative. Elicit a clear yes or no answer.

Consider using a syllogism to state your issue. A syllogism has three components:

- major (legal) premise;
- minor (factual) premise;
- conclusion.

### References

Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 41–42

Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* 77–131

Judith D. Fischer, *Got Issues? An Empirical Study About Framing Them*, 6 J. Ass'n Legal Writing Directors 1, 6 (2009)

## VI. The major premise

The major premise contains the rule controlling the outcome of your case (in cases where there is a clear controlling rule).

The major premise is derived from a text (constitution, statute, etc.), precedent (case law), or policy considerations.

Frequently, major premise is accepted by both parties.

#### References

Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 41–42  
Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* 105

### **VII. The minor premise**

The minor premise presents the facts relevant to (or invoking) the controlling rule. Only include the facts necessary to explain your case to the court. But the entire issue should not exceed 75 words. The ideal length is between 50 and 75 words.

#### References

Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 41–42;  
Bryan A. Garner, *Going Deep the Key to Effective Pleadings Is A Clear and Succinct Statement of the Issues—and Here’s How to Do It*, A.B.A.J., March 2017, at 26 (2017)

### **VIII. The conclusion**

The conclusion flows inevitably from the major and minor premises. Express your issue as a question that leads to a clear yes or no answer.

#### References

Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* 143–144  
Judith D. Fischer, *Got Issues? An Empirical Study About Framing Them*, 6 J. Ass’n Legal Writing Directors 1, 22 (2009)